MAJLIS DAERAH DUNGUN

v.

TENAGA NASIONAL BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NOOR AHMAD J
[SUIT NO: S1-21-81-96]
24 DECEMBER 1997

CIVIL PROCEDURE: *Affidavits - Affidavit in reply - Filing and service - Notice of intention to use affidavit - Rules of the High Court 1980, O. 32 r. 13(1) - Affidavit in reply filed for particular proceeding intended to be used in another proceeding - Whether may be used although more than 14 days passed since filing of affidavit in reply by opposing party in other proceeding - Whether contrary to O. 32 r. 13(2)(b) Rules of the High Court 1980 - Whether filing notice of intention tantamounts to circumventing O. 32 r. 13(2)(b) - Whether O. 32 r. 13(2) does not apply to procedure in O. 32 r. 13(1)*

CIVIL PROCEDURE: *Affidavits - Affidavit in reply - Filing and service - Rules of the High Court 1980, O. 32 r. 13(2)(b) - Whether 14-day time period to file applies only to affidavit in reply to affidavit in support of application in chambers - Whether does not apply to subsequent affidavits in reply*

On 9 September 1996, the plaintiff filed an application, supported by an affidavit, for summary judgment pursuant to O. 14 of the Rules of the High Court 1980 ('the RHC'). On 23 September 1996, the defendant responded by filing and serving two affidavits in reply ('the defendant's affidavits in reply'). On 6 February 1997, the defendant filed an application, supported by an affidavit, to strike out the plaintiff's action relying on O. 18 r. 19 of the RHC. The plaintiff responded by filing an affidavit in reply on 12 March 1997 ('the said affidavit'). Subsequently, the plaintiff filed a notice of intention to use the said affidavit at the hearing of its application under O. 14.

At the hearing of the plaintiff's O. 14 application, the defendant raised a preliminary objection against the use of the said affidavit in that hearing. It was contended that if the plaintiff intended to reply to the defendant's affidavits in reply, pursuant to O. 32 r. 13(2)(b) of the RHC, it should have done so within 14 days from the service of the defendant's affidavits in reply. Hence, the defendant submitted that there was a delay of some five months in filing the said affidavit. It was further submitted that by the filing of the notice of intention to use the said affidavit at the O. 14 hearing, the plaintiff was attempting to circumvent the requirement in O. 32 r. 13(2)(b) of the RHC. The senior assistant registrar dismissed the preliminary objection and thus the

defendant appealed. The issue before the court was whether the plaintiff is entitled to use the said affidavit – which was filed in reply to the defendant's application under O. 18 r. 19 of the RHC – at the hearing of the O. 14 application by merely giving notice to the defendant of its intention to do so.

Held:

[1] The plaintiff is entitled to resort to the procedure provided for in O. 32 r. 13(1)(a) of the RHC which states, inter alia, that a party filing an affidavit intended to be used by him in any proceedings in chambers must give notice of his intention to do so.

[1a] By the phrase "Save as otherwise provided in these rules…" appearing in O. 32 r. 13(2) of the RHC, the subrule does not apply to any provisions to the contrary, in particular to the procedure in O. 32 r. 13(1) of the RHC.

[2] Order 32 r. 13(2) of the RHC applies only to an affidavit in support of an application in chambers and to an affidavit in reply to the affidavit in support of such an application. It does not apply to subsequent affidavits because if it were intended to apply to subsequent affidavits, the subrule would have expressly provided as such.

[Appeal dismissed.]

Case(s) referred to:

PB Securities Sdn Bhd v. Abdul Rashid Mohamed [1994] 3 CLJ 209 ***(dist)***
Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors [1996] 4 CLJ 461 ***(refd)***
Perbadanan National Insuran Sdn Bhd v. Pui Lai Ong [1996] 3 CLJ 321 ***(dist)***
Standard Chartered Bank Malaysia Bhd v. Eng Song Huat [1996] 2 CLJ 714 ***(dist)***
Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd [1996] 2 MLJ 678 ***(dist)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 32, r. 13(1), (2), (b), (a), O. 18, r. 19

For the appellant/defendant - Goh Peng Hong; M/s Bakar & Partners
For the respondent/plaintiff - Jayanthi Pillay; M/s Kadir, Tan & Ramli

Reported by Anushana Balasubramaniam

JUDGMENT

Mohd Noor Ahmad J:

The defendant appealed against the decision of the learned senior assistant registrar which dismissed its preliminary objection against the use of the affidavit of one Abdullah Hazawi bin Jaafar affirmed on 10 March 1997

(hereinafter referred to as 'the said affidavit') by the plaintiff in the proceeding under O. 14 of the Rules of the High Court 1980. The objection was grounded on the delay in filing the said affidavit contrary to O. 32 r. 13(2)(b) of the rules. I dismissed the appeal and hence this appeal.

Briefly, by a writ filed on 5 July 1996, the plaintiff claimed against the defendant, *inter alia*, a sum of RM31,625,000 being the arrears of assessment in respect of Paka Power Station owned by the defendant. On 9 September 1996, the plaintiff filed an application for summary judgment under O. 14 of the rules with the supporting affidavit affirmed by one Abdullah Hazawi bin Jaafar (per encls. (3) and (2). On 23 September 1996, the defendant filed and served two affidavits in reply (per encls. (12) and (14)). On 6 February 1997, the defendant filed an application under O. 18 r. 19 of the rules together with an affidavit in support to strike out the writ and the statement of claim (per encls. (22) and (20). On 12 March 1997, the plaintiff filed an affidavit in reply, which is the said affidavit (per encl. (28)). On 13 March 1997, the plaintiff filed two notices of its intention to use firstly, the said affidavit at the hearing of its O. 14 application and secondly the affidavit in support of its application under O. 14 of the rules (encl. (2)) at the hearing of the defendant's application under O. 18 r. 19 of the rules, of which the defendant were duly notified (per encls. (27) and (26)). The hearing of O. 14 application was proceeded first on 18 March 1997 where the preliminary objections was raised.

The defendant contended that as the plaintiff was served with the defendant's affidavits in reply (encls. (12) and (14)) to the plaintiff's affidavit in support of the O. 14 application (encl. (2)) on 23 September 1996, the plaintiff if it intended to reply to the defendant's affidavits in reply should have filed and served it within 14 days from 23 September 1996 as required under O. 32 r. 13(2) of the rules. Hence, there was a delay of more than five months calculated from 23 September 1996 when the defendants affidavits in reply were served on the plaintiff to 12 March 1997 when the said affidavit was filed. In having filed and served the notice of intention to use the said affidavit at the hearing of the O. 14 application the plaintiff was attempting to circumvent the requirement of O. 32 r. 13(2) of the rules. Therefore, the said affidavit ought to be rejected.

The issue before me is whether the plaintiff is entitled to use the said affidavit (which was filed for the purpose of the application under O. 18 r. 19 of the rules) at the hearing of the O. 14 application by the plaintiff merely giving notice to the defendant of its intention to do so? My view is that the plaintiff is entitled to resort to the procedure provided for under O. 32 r. 13(1)(a) of the rules.

Rule 13(1) reads:

> Any party -
>
> (a) filing an affidavit intended to be used by him in any proceedings in Chambers; or
>
> (b) intending to use in any such proceedings any affidavit filed by him in previous proceedings, must give notice to every other party of the filing or, as the case may be, of his intention to do so.

And r. 13(2) provides:

> Save as otherwise provided in these rules -
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
>
> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

It is evident that by virtue of the phrase "Save as otherwise provided in these rules – "appearing in sub-r. (2) the application of the subrule does not apply to any provisions to the contrary, in particular to the procedure in sub-r. (1) of r. 13. Sub-rule (2) applies only to an affidavit in support of an application in chambers and to an affidavit in reply to the affidavit in support of such application but not to subsequent affidavits, otherwise the subrule would have expressly provided so. There is no doubt that the subrule was specifically enacted to eradicate the rampant abuse of process by malevolent, indolent or unpaid practitioners who had devised a fall-safe method of causing unwarranted delays by filing affidavits at the last minute see *Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors* [1996] 4 CLJ 461; [1997] 1 MLJ 453 @ 470H and that it may be argued that the interpretation that I have given to the subrule may once again give rise to the mischief that the enactment had intended to eradicate. However, to my mind, the purpose of the enactment can still be maintained because the procedure laid down in sub-r. (1) appears to be expeditious and supplementary to the purpose of sub-r. (2). That is the only construction that can be given to subr. (2) in order to harmonise sub-r. (1) and sub-r. (2). Any other construction would result in the non-application of sub-r. (1) under any circumstances and would lead to absurdity.

(3) The defendant's counsel cited the following cases in support of his argument:

(i) *Perbadanan National Insuran Sdn Bhd v. Pui Lai Ong* [1996] 3 CLJ 321; [1996] 3 MLJ 85

(ii) *Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuoas & Ors* [1996] 4 CLJ 461; [1997] 1 MLJ 453.

(iii) *Standard Chartered Bank Malaysia Bhd v. Eng Song Huat* [1996] 2 CLJ 714; [1996] 1 AMR 726.

(iv) *PB Securities Sdn Bhd v. Abdul Rashid bin Mohamed* [1994] 3 CLJ 209; [1994] 3 MLJ 169.

(v) *Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678.

With respect, my view is that those cases are not relevant for the present consideration. They are generally concerned with the filing and service of the affidavits that fall within the ambit of sub-r. (2) of r. 13 of O. 32 of the rules. Whereas in the case before me, it involves the construction of sub-r. (1) *vis-a-vis* sub-r. (2) of r. 13. Hence, the issue on the alleged delay need not be considered.

Therefore, the appeal is dismissed with costs.